

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ROBERT E. NESBITT,

Plaintiff,

v.

PROGRESSIVE NORTHWESTERN  
INSURANCE COMPANY,

Defendant.

Case No. C11-2117RSL

ORDER GRANTING MOTION  
FOR SUMMARY JUDGMENT

**I. INTRODUCTION**

This matter comes before the Court on a motion for summary judgment (Dkt. # 30) filed by defendant Progressive Northwestern Insurance Company (“Progressive”). Progressive requests that the Court dismiss all remaining claims filed by plaintiff Robert Nesbitt, who asserts claims arising out of an insurance contract with Progressive. The Court heard oral argument on October 29, 2012.

For the reasons set forth below, the Court grants defendant’s motion.

**II. DISCUSSION**

**A. Background Facts**

Plaintiff has two cars, a 1987 Mercedes-Benz and a 1995 Mitsubishi, both of which are insured by Progressive under a common policy. Order (Dkt. # 11) at 1-2. The policy contains

1 personal injury protection (“PIP”) up to a limit of \$10,000 and underinsured motorist (“UIM”)  
2 coverage up to \$25,000 per person. Id. at 2.

3 On July 15, 2010, plaintiff was washing his cars in the street when another driver crashed  
4 into the Mitsubishi, propelling the Mitsubishi into the back of the Mercedes. Id. The Mercedes  
5 shot forward and hit the plaintiff. Id. Plaintiff suffered serious injuries. Id. Plaintiff reported  
6 the claim to Progressive the following day. Motion (Dkt. # 30) at 2.

7 On April 4, 2011, the third-party tortfeasor’s insurance company offered to pay plaintiff  
8 \$50,000, the tortfeasor’s policy limits, to settle plaintiff’s personal injury claim. Notice of  
9 Removal (Dkt. # 1), Ex. B (the “Complaint”) at 4. Plaintiff, through his attorney, offered  
10 Progressive the opportunity to pay plaintiff \$50,000 in exchange for his right to sue the third-  
11 party tortfeasor. Response (Dkt. # 32) at 22. Progressive did not respond and as a result,  
12 plaintiff informed Progressive that he planned to accept the offer from the third-party  
13 tortfeasor’s insurance company. Id. at 24. At that time, plaintiff also requested that Progressive  
14 open a file for his UIM claim and assign an adjustor. Id. Plaintiff did not receive a response  
15 from Progressive. Id. at 6.

16 Unfortunately, the third-party tortfeasor’s insurance company subsequently determined  
17 that plaintiff could not recover PIP medical benefits from it because plaintiff was not actually  
18 struck by its insured auto. Id. at 27. After receiving notice of this decision, Progressive re-  
19 opened plaintiff’s PIP claim and paid him \$9,217.28. Id. at 30-31. Progressive also paid  
20 plaintiff \$3,043.29 for property damage to the Mitsubishi, \$3,600 for property damage to the  
21 Mercedes, and \$25,000 in UIM coverage. Order at 2.

22 On November 10, 2011, plaintiff filed suit against Progressive in King County Superior  
23 Court for breach of contract and unfair and deceptive trade practices. Complaint. The case was  
24 removed to federal court on December 16, 2012 by Progressive. On May 25, 2012, the Court  
25 granted Progressive’s motion for partial summary judgment, dismissing plaintiff’s contract-  
26 based claims. Order at 13. Plaintiff’s remaining claims against Progressive include violations of

1 Washington's Consumer Protection Act, RCW 19.86.090, and the Insurer Fair Conduct Act,  
2 RCW 48.30.15. Motion at 1-2. Plaintiff also alleges that Progressive acted in bad faith. Id.  
3 Progressive now requests that the Court dismiss all of plaintiff's remaining claims.

4 **B. Summary Judgment Standard**

5 Summary judgment is appropriate when, viewing the facts in the light most favorable to  
6 the nonmoving party, the records show that "there is no genuine dispute as to any material fact  
7 and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Once the  
8 moving party has satisfied its burden, it is entitled to summary judgment if the non-moving party  
9 fails to designate, by affidavits, depositions, answers to interrogatories, or admissions on file,  
10 "specific facts showing that there is a genuine issue for trial." Celotex Corp. v. Catrett, 477 U.S.  
11 317, 324 (1986).

12 All reasonable inferences supported by the evidence are to be drawn in favor of the  
13 nonmoving party. See Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1061 (9th Cir. 2002).  
14 "[I]f a rational trier of fact might resolve the issues in favor of the nonmoving party, summary  
15 judgment must be denied." T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d  
16 626, 631 (9th Cir. 1987). "The mere existence of a scintilla of evidence in support of the  
17 non-moving party's position is not sufficient." Triton Energy Corp. v. Square D Co., 68 F.3d  
18 1216, 1221 (9th Cir. 1995). "[S]ummary judgment should be granted where the nonmoving  
19 party fails to offer evidence from which a reasonable jury could return a verdict in its favor." Id.

20 **C. Plaintiff's Request for Continuance**

21 Plaintiff's vague request for a continuance does not meet the strictures of Federal Rule of  
22 Civil Procedure 56. Plaintiff does not state what the requested discovery will reveal or how it  
23 will defeat summary judgment. His vague motion is insufficient to justify a continuance. See,  
24 e.g., Tatum v. City & County of San Francisco, 441 F.3d 1090, 1100 (9th Cir. 2006) ("A party  
25 requesting a continuance pursuant to Rule 56([d]) must identify by affidavit the specific facts  
26 that further discovery would reveal, and explain why those facts would preclude summary  
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1 judgment.”). Accordingly, plaintiff’s motion for a continuance is denied.

2 **D. Defendant’s Motion to Strike**

3 In its reply, Progressive makes two requests to strike documents submitted by plaintiff.  
4 First, Progressive requests that the Court strike plaintiff’s entire response as untimely pursuant to  
5 Local Civil Rule 7(d)(3). Reply (Dkt. # 33) at 2. In light of the strong interest in resolving  
6 disputes on their merits and the fact that Progressive received plaintiff’s response just one day  
7 after the deadline, the Court has considered plaintiff’s untimely response. The Court assumes  
8 that plaintiff’s counsel will take whatever steps are necessary to avoid future technical problems  
9 in filing on the CM/ECF system, including not waiting until the last minute before attempting to  
10 docket his responsive memorandum.

11 Second, Progressive requests that the Court strike the exhibits attached to plaintiff’s  
12 response because they were submitted without a separate affidavit or declaration. Id. at 2-3.  
13 Although the better practice is to submit a separate supporting affidavit or declaration with  
14 exhibits, the Court finds that plaintiff’s counsel’s signed statement in the body of response  
15 provides sufficient authentication for admissibility. See Las Vegas Sands, LLC v. Nehme, 632  
16 F.3d 526, 533 (9th Cir. 2011). Therefore, the Court denies Progressive’s motion to strike.

17 **E. Analysis**

18 **a. Bad Faith**

19 Plaintiff claims that Progressive acted in bad faith by initially refusing to process his UIM  
20 claim without justification, failing to extend PIP coverage and UIM coverage under the  
21 provisions of the insurance policy issued under the Mitsubishi, and mishandling his PIP claim.  
22 Complaint at 6-7. In its motion, Progressive requests that the Court dismiss all of plaintiff’s  
23 remaining claims. Mot. at 17. During oral argument, plaintiff abandoned his claims regarding  
24 Progressive’s handling of his UIM claim. Therefore, the Court confines its inquiry to plaintiff’s  
25 claim that Progressive mishandled his PIP claim.

26 An insured’s claim of bad faith against the insurer is analyzed using the same framework  
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1 as any other tort. Smith v. Safeco Ins. Co., 150 Wn.2d 478, 485 (2003). To prevail, the insured  
2 must establish that the insurer's breach was unreasonable, frivolous, or unfounded. Overton v.  
3 Consol. Ins. Co., 145 Wn.2d 417, 433 (2002). The Washington Administrative Code ("WAC")  
4 contains The Unfair Claims Settlement Practices Regulation, WAC 284-30-300 to 284-30-450,  
5 governing the conduct of insurance companies in handling claims. A violation of those  
6 regulations establishes a breach of the duty of good faith. Am. Mfrs. Mut. Ins. Co. v. Osborn,  
7 104 Wn. App. 686, 697-98 (2001). Plaintiff's bad faith claim is premised on Progressive's  
8 failure to respond to communications about PIP claims in violation of WAC 284-30-330(2) and  
9 284-30-360(3). Response at 5-6.

10 Progressive contends that plaintiff cannot maintain a claim of bad faith because this Court  
11 determined that "[p]laintiff was not entitled to any further benefits under the policy" and  
12 dismissed plaintiff's breach of contract claim. Reply at 7. The Washington Supreme Court has  
13 previously rejected this line of argument. Coventry Associates v. American States Ins. Co., 136  
14 Wn.2d 269, 279(1998) ("We hold an insured may maintain an action against its insurer for bad  
15 faith investigation of the insured's claim and violation of the CPA regardless of whether the  
16 insurer was ultimately correct in determining coverage did not exist. An insurer's duty of good  
17 faith is separate from its duty to indemnify if coverage exists.").

18 However, to succeed on a claim of bad faith, an insured must show that he was harmed  
19 by the insurer's bad faith conduct. Id. at 277. Plaintiff has not provided any evidence that he  
20 suffered any specific harm as a result of Progressive's regulatory violations. See Response at 8.  
21 Plaintiff's allegation that he suffers the "burden" of paying medical bills with money he  
22 received from Progressive is insufficient to prove "actual harm." St. Paul Fire & Marine Ins. Co.  
23 v. Onvia, Inc., 165 Wn.2d 122, 133 (2009). Plaintiff has failed to raise a genuine issue of  
24 material fact as to the harm element and his bad faith claim fails as a matter of law.

25 **b. Consumer Protection Act ("CPA")**

26 To succeed on a CPA claim, a plaintiff must show (1) an unfair or deceptive act or  
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1 practice in trade or commerce that impacts the public interest, and (2) resulting injury to the  
2 claimant's business or property. Am. Mnfs. Ins. Co., 104 Wn. App. at 697. The insured may  
3 establish the first element by showing that the insurer violated a subsection of WAC 284-30-330.  
4 Id.

5 Plaintiff relies on the same facts underlying his claim of bad faith to assert a claim that  
6 Progressive violated the CPA. See Response at 8-9. Progressive does not respond to plaintiff's  
7 allegation that it violated The Unfair Claims Settlement Practices Regulation in its reply, but  
8 asserts that plaintiff has not suffered any resulting injury and therefore, his claim cannot succeed.  
9 Reply at 7-9. The Court agrees with Progressive. Although plaintiff may be able to establish  
10 that Progressive engaged in an unfair or deceptive act by failing to communicate with him in a  
11 timely manner, he has not provided any evidence that the alleged unfair act resulted in injury to  
12 his business or property. Plaintiff's assertion that Progressive's conduct "caused him to suffer  
13 real and actual damages" is insufficient to defeat summary judgment. Baldwin v. Silver, 165  
14 Wn. App. 463, 471 (2011) ("A nonmoving party cannot defeat a motion for summary judgment  
15 with conclusory statements of fact"). Therefore, the Court grants Progressive's motion for  
16 summary judgment on plaintiff's CPA claim.

17 **c. Insurance Fair Conduct Act ("IFCA")**

18 Progressive moves to dismiss plaintiff's IFCA claim on the grounds that plaintiff was not  
19 denied coverage, Progressive acted reasonably in paying the amounts due under the policy, and  
20 plaintiff has not suffered any damages as result of Progressive's conduct. Motion at 15-16.  
21 Plaintiff has not raised any arguments or presented any evidence in response to defendant's  
22 request for summary judgment on his IFCA claim. The Court considers such a failure to be "an  
23 admission that the motion has merit." Local Civil Rule 7(b)(2). Additionally, the Court finds  
24 that plaintiff's claim fails as a matter of law because he was not denied coverage. Cardenas v.  
25 Navigators Ins. Co., 2011 WL 6300253, at \*6 (W.D.Wash. Dec. 16, 2011) ("Although violations  
26 of the enumerated regulations provide grounds for trebling damages or for an award of  
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1 attorney's fees; they do not, on their own, provide a IFCA cause of action absent an  
2 unreasonable denial of coverage or payment of benefits.'').

3 **III. CONCLUSION**

4 For all of the foregoing reasons, the Court GRANTS Progressive's motion for summary  
5 judgment (Dkt. # 30). The Court GRANTS the motion as to plaintiff's claims of bad faith,  
6 violation of the CPA, and violation of the IFCA. The Clerk of the Court is directed to enter  
7 judgment in favor of defendant and against plaintiff.

8 DATED this 29th day of October, 2012.  
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12 Robert S. Lasnik  
13 United States District Judge  
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